No. 75-1476

In the Supreme Court of the United States

OCTOBER TERM, 1975

THE ATCHISON, TOPEKA, AND SANTA FE RAILWAY COMPANY, ET AL., APPELLANTS

v.

UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

MOTION TO AFFIRM

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Pursuant to Rule 16(1)(c) of the Rules of this Court, the United States and the Interstate Commerce Commission move that the judgment of the district court be affirmed.

STATEMENT

This is a direct appeal from the final judgment of a three-judge United States District Court for the Eastern District of Pennsylvania (403 F. Supp. 1327; App. B, 4a–12a) dismissing appellants' action to set aside the December 30, 1974, decision and order of the Interstate Commerce Commission (App. C,

13a–17a). The Commission's order directed appellant railroads to cancel within thirty days their proposed increased rates for transportation of fresh fruits and vegetables from the western and southwestern States to the consuming markets in the east and south.

Section 15(7) of the Interstate Commerce Act, 24 Stat. 384, as amended, 49 U.S.C. 15(7), authorizes the Commission to suspend proposed rate schedules for seven months pending hearings. Unless the Commission determines that the proposed rates are unlawful, the rates become effective upon the expiration of the seven-month period. Pursuant to Section 15(7), the Commission on May 28, 1974, suspended the rate increase proposed by appellants and instituted an inquiry into the lawfulness of the proposed increased rate schedules.

During the suspension period, the Commission held extended hearings, presided over by an Administrative Law Judge, in Washington, D.C. (September 9–13; November 11–20; December 16–20), San Francisco (October 16–November 1) and Dallas (December 9–11), receiving more than 5,600 pages of testimony and 200 exhibits from appellants and various protestants. From December 16 through December 20, 1974, appellants presented extensive rebuttal testimony (Tr. 4859–5632) and introduced fifty rebuttal exhibits (Exhibits 148–166, 168–169, 171–178, 180–200),[1] but then rejected the December 9 request

[1] At the conclusion of the hearings on December 20, 1974, the Administrative Law Judge had granted appellants' request to file a brief in this proceeding (Tr. 5634) and had set February 3, 1975, as the briefing date (Tr. 5635).

of the Administrative Law Judge to extend the effective date of the proposed rates beyond the December 30 expiration of the suspension period (Tr. 4356). On December 18, 1974, a Division of the Commission directed appellants to keep account of all amounts collected as a result of the increased rates after they went into effect on December 31, 1974, so that appropriate refunds could be made in the event that the new rates were not found to be just and reasonable (App. D, 36a).

On December 30, 1974, the entire Commission determined that appellants had failed in six material respects to show the reasonableness of the proposed rates (App. C, 15a–16a). The Commission also found, *inter alia,* that the proposed rates, "which represent increases as high as 132 percent over present rates," would seriously disrupt the marketing of fresh fruits and vegetables, would endanger the availability of fresh produce for large segments of the nation's population and would eliminate the railroads as effective carriers of fresh produce (App. C, 14a). In view of these findings and the need for the Commission to act expeditiously to fulfill its responsibility under Section 15(7), the Commission deemed it unnecessary to await the filing of an initial decision by the Administrative Law Judge (App. C, 15a) or the filing of briefs by the parties (App. C, 16a). The Commission indicated that it would subsequently issue a supplemental report and order to explain in substantially greater detail the reasons for its findings (App. C, 16a). A lengthy supplemental report was issued on

March 14, 1975 (App. D, 18a–130a). The supplemental report also directed appellants to refund, with four-percent interest, the additional charges collected under the invalid tariff (App. D, 36a).

Appellants brought suit, contending that the Commission's decision to forego the filing of briefs violated their hearing rights under both Section 557 of the Administrative Procedure Act ("APA"), 5 U.S.C. 557, and the Interstate Commerce Act, as well as their constitutional rights to due process of law. A unanimous three-judge district court rejected appellants' contentions. The court found it unnecessary to decide whether Section 557 of the APA, rather than Section 553, was applicable to this rulemaking proceeding since it concluded that the Commission had complied with the applicable standards of ~~both~~ both sections (App. B, 7a–8a). Noting the 5,636 pages of transcript and 200 exhibits that made up the record, the court held that the Commission had "afforded [appellants] every reasonable opportunity to be heard" (App. B, 9a) and had thereby complied with the hearing requirements of the APA and the Interstate Commerce Act as well as due process of law.

ARGUMENT

In this Court, appellants do not challenge the Commission's findings that they failed to show that the proposed rates were reasonable. Rather, they argue that they were not given a reasonable opportunity to present their case to the Commission, despite the fact

that extensive hearings were held, resulting in a record of more than 5,600 pages of testimony and 200 exhibits. The district court thoroughly examined this massive record and correctly determined that appellants had ample opportunity to present their evidence and arguments to the Commission. There is no need for this Court to undertake plenary review of this essentially factual determination. The decision below is correct and should be affirmed.

Appellants contend that the Commission's suspension order must be set aside because they were not given the opportunity during the agency proceedings to submit briefs and proposed findings of fact as Section 557(c) of the APA requires. Although we shall assume, as did the district court (App. B, 7a–8a), that Section 557 would generally apply to proceedings under Section 15(7) of the Interstate Commerce Act, Section 557(c) did not govern the proceedings in this case and, even if it did, the procedure followed by the Commission satisfied the requirements of that subsection.

Section 557 generally contemplates a two-step method of agency decision-making: under Section 557(b), when the agency itself does not preside at the reception of evidence, the qualified employee who did preside "shall initially decide the case * * *" and that "initial decision" shall become the agency's unless there is an administrative appeal. However, in regard to rulemaking, this two-step adjudication process may be omitted when the agency finds that "timely

execution of its functions" requires this. 5 U.S.C. 557(b)(2).

Here the Commission so found in light of the impending expiration of the seven-month suspension of the effectiveness of the new rates. Accordingly, the Commission decided the matter itself without waiting for the Administrative Law Judge to render an initial decision. There is no dispute that under Section 557(b)(1) the Commission acted properly in this regard: the need for prompt agency action is apparent and the proceedings were "rule making," which under Section 551(4) and (5) include the agency process involved in the "approval or prescription for the future of rates * * *."

In this situation, Section 557(c), upon which appellants rely, did not apply. Section 557(c) provides that the parties are entitled to a reasonable opportunity to submit for the consideration of participating employees proposed findings "[b]efore a recommended, initial, or tentative decision * * *."[2] As the quoted language indicates, Section 557(c) contemplates, but does not itself require, two-step agency decision-making which involves a recommended, initial, or tentative decision prior to the issuance of the final agency decision. In this case, however, the Commission properly omitted the first step because timely execution of the Commission's functions—in the words of Section 557(b)(2)—"imperatively and unavoidably so require[d]." The Commission therefore was not required to delay its final decision in order to give the parties time to submit proposed findings and conclusions. Cf. S. Doc. No. 248, 79th Cong., 2d Sess. 210, 273 (1946).

[2] Section 557(c) also deals with the procedure on agency review of a subordinate employee's decision or recommended decision.

However, whether Section 557(c) applied is a question the district court did not decide. It held instead—and we agree—that the Commission in any event provided appellants with the requisite "reasonable opportunity" to be heard in compliance with their rights, both statutory and constitutional (App. B, 9a–10a). The record gathered consisted of more than 5,600 pages of testimony and 200 exhibits. During the course of the hearings, appellants presented extensive arguments in their case-in-chief (see *e.g.*, Exhibits 3, 4, 22) and in rebuttal (see, *e.g.*, Exhibits 148–166, 168–169, 171–178, 180–200), and they reargued their position in a lengthy petition filed prior to the January 30, 1975, cancellation date of the increased rates.[3] In substance, they had the opportunity to and in fact did propose findings and urge reasons in support thereof. Under these circumstances, appellants received the benefit of trial-type hearings with the opportunity for cross-examination and rebuttal and were not denied a fair opportunity to persuade the Commission.

[3] Appellants' petition was filed with the Commissionon January 20, 1975.

CONCLUSION

The judgment of the district court should be affirmed.

Respectfully submitted.

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